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Supreme Court affirms government wetlands protections; conservatives, in minority, complain

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WASHINGTON — The Supreme Court ruled Monday that the government can block development on hundreds of millions of acres of wetlands, even on land miles away from waterways, in a fractured ruling that went against the new conservative court members.

Chief Justice John Roberts came up one vote short of dramatically limiting the scope of the landmark Clean Water Act.

Virtually any land in America could be regulated under the government's interpretation of the law, Roberts and the court's other three conservatives complained in dissent.

The court's four liberal members said the conservatives would have opened up sensitive wetlands to polluters.

It was a dramatic conclusion to a pair of property rights cases the justices agreed to review last fall, just days after Roberts joined the court. The Bush administration defended the law and had urged the court to stay out of the case.

The justices were so splintered that there were five separate opinions covering 100 pages.

The key decision was by Justice Anthony M. Kennedy, a moderate who agreed with the liberal members that federal regulations can apply to land adjacent to tributaries, including tributaries that are not filled with water all year.

Kennedy, however, joined conservatives in ruling that regulators may have misinterpreted the Clean Water Act when they refused to let two Michigan property owners build a shopping mall and condominiums on wetlands they own.

The justices voided rulings against Keith Carabell and John Rapanos. Carabell wanted to build condos on wetlands on property about a mile from Lake St. Clair in Macomb County, Mich. Rapanos filled in wetlands near Midland, Mich., on property that is about 20 miles from a river that empties into Lake Huron. Rapanos was prosecuted by the federal government and faced a separate civil lawsuit.

"The court is clearly troubled by the federal government's view that it can regulate every pond, puddle and ditch in our country," said Reed Hopper, a Pacific Legal Foundation attorney who represented Rapanos.

Environmental groups were relieved the ruling was not sweeping.

"Five justices of the Supreme Court wrote or joined opinions that support broad protection for rivers, streams, and wetlands under the Clean Water Act," said Doug Kendall, executive director of the Community Rights Counsel.

Jim Murphy, a lawyer with the National Wildlife Federation, said: "Justice Kennedy saves it from being an absolute disaster."

Justices seemed worried about the impact of the ruling.

Roberts said the result was confusing and that "lower courts and regulated entities will now have to feel their way on a case-by-case basis."

Justice John Paul Stevens, the leader of the court liberals, said Congress or the Army Corps of Engineers — and not appointed judges — should clarify the issue.

He predicted developers will be confused about whether they must get permits to do work, and federal regulators will struggle to apply a test spelled out by Kennedy to determine whether land has a connection to a navigable waterway.

Kennedy said the wetlands must "significantly affect the chemical, physical, and biological integrity" of nearby navigable waters to come under the Clean Water Act.

"There's going to be a lot of administrative headaches," said Timothy Searchinger, an attorney with Environmental Defense. "Ultimately every water body that's protected today should still be protected."

Justice Antonin Scalia led the conservative bloc, including Roberts, Justice Clarence Thomas and new Justice Samuel Alito.

Scalia said federal regulators contend they have jurisdiction over as much as 300

million acres of swampy lands in America, "including half of Alaska and an area the size of California in the lower 48 states."

"The entire land area of the United States lies in some drainage basin," he wrote.

Scalia had said the Corps of Engineers misinterpreted the term "waters of the United States."

"In applying the definition to 'ephemeral streams,' 'wet meadows,' storm sewers and culverts, ... man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody," he wrote.

Stevens said Scalia's opinion "needlessly jeopardizes the quality of our waters." He laid out a history of the 1972 Clean Water Act and said "the importance of wetland for water quality is hard to overstate."

Scalia, Stevens and Kennedy spent nearly a half hour Monday explaining their votes from the bench.

"Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular," Kennedy said in his decision. Scalia's opinion, Kennedy said, "seems unduly dismissive of the interests asserted by the United States in these cases."

The case follows a line of difficult environmental cases at the court. In 2002, justices deadlocked 4-4 in a case that asked whether farmers should have more freedom to work in wetlands. In 2001, the court split 5-4 in ruling that the Clean Water Act does not cover isolated ponds and mud flats.

The cases are Rapanos v. United States, 04-1034, Carabell v. Army Corps of Engineers, 04-1384.

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